

Employee or Independent Contractor?

Sometimes an employer will classify workers as contractors instead of employees. In these cases, contract workers are responsible for paying their own payroll taxes, including federal and state income taxes and both the employer and employee portion of Social Security taxes. In most cases, contractors are responsible for providing their own Workers Compensation Insurance and are not eligible for Unemployment Insurance if their services are no longer needed.

Generally, a worker who performs services for an employer is an employee if the employer can control both *what* will be done and *how* it will be done. The key factor is that the employer has the right to control the details of how the services are performed, even if the employee has substantial freedom of action.

By contrast, an independent contractor performs services required by an employer but is not subject to the employer's control about how the services are performed.

The Virginia Unemployment Compensation Act, § 60.2-212C provides that "Services performed by an individual for remuneration shall be deemed to be employment subject to this title unless the Commission determines that such individual is not an employee for purposes of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, based upon application of the 20 factors set forth in Internal Revenue Service Ruling 87-41".

Generally speaking, a worker is an employee if his or her employer:

- Furnishes tools, materials and equipment needed to do the work;
- Sets the hours of work;
- Withholds payroll federal and state income taxes and Social Security taxes;
- Receives direction and training from the employer about how to do the work; and
- Is paid by the hour, week, or month instead of being paid at the completion of a job.

To help determine whether a worker is an employee, [the IRS identified 20 factors](#) [1] that may indicate whether the employer can exercise enough control to establish an employer-employee relationship. Not all the factors must be present to find an employee/employment relationship, but **the factors are guides** to assess the likelihood as to **whether an individual is an employee or an independent contractor**. The 20 factors and Virginia's exemptions to employee classification can be found [here](#) [1]. *An employer who misclassifies workers may be subject to penalties under Section 60.2-513 of the Virginia Unemployment Compensation Act.*

If you need help determining if you have been classified properly please contact our employer Ombudsman at 804-786-4313 or by e-mail ombudsman@vec.virginia.gov [2]. A Tax Representative will review your situation and be able to determine proper worker status.

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[1] <http://www.vec.virginia.gov/irs-20-factors-and-exemptions>

[2] mailto:ombudsman@vec.virginia.gov